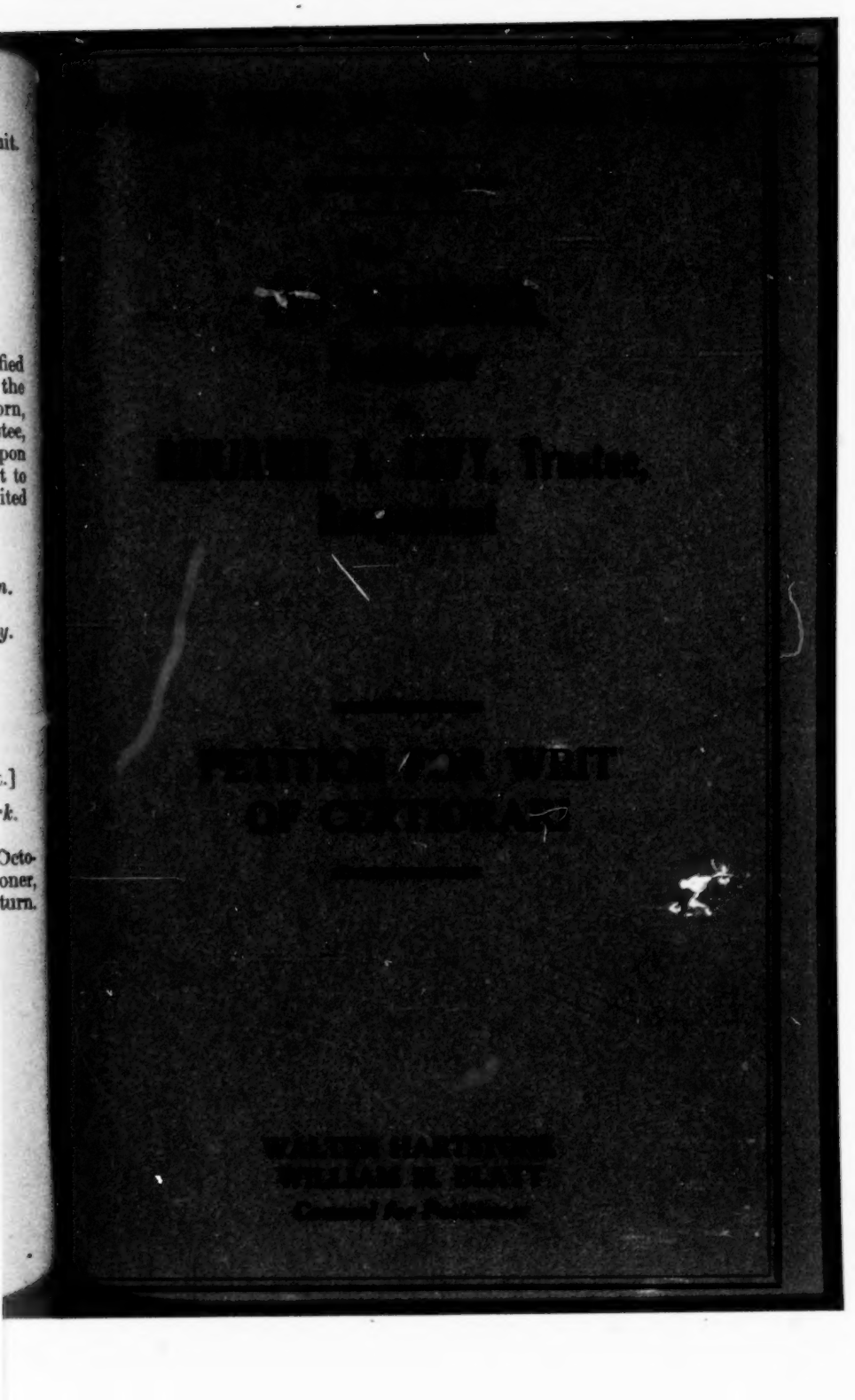


SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1917

No.

LEO WEIDHORN,
Petitioner

v.

BENJAMIN A. LEVY, Trustee,
Respondent

PETITION FOR WRIT OF CERTIORARI

WALTER HARTSTONE
WILLIAM M. BLATT
Counsel for Petitioner

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1937

No.

LEO WEINHORN,

Petitioner

v.

BENJAMIN A. LEVY, Trustee,

Respondent

PETITION FOR WRIT OF CERTIORARI

WALTER HARRISTONE
WILLIAM M. SLATT
Counsel for Petitioner

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1917.

No.

LEO WEIDHORN, PETITIONER

v.

BENJAMIN A. LEVY, Trustee, RESPONDENT.

To the Honorable, the Chief Justice and the Associate Justices of the United States Supreme Court:

The petitioner, Leo Weidhorn, respectfully shows to this Honorable Court, as follows:—

The respondent, Benjamin A. Levy, in his capacity as trustee in Bankruptcy of the Estate of J. Herbert Weidhorn, filed a petition in the form of a Bill in Equity (Transcript, p. 5) against the petitioner, Leo Weidhorn, in the office of the Referee in Bankruptcy to whom the said Bankrupt's case had been referred. The petition alleged that the said Leo Weidhorn, a brother of the bankrupt, had, for the purpose of defrauding the creditors of the bankrupt, taken a chattel mortgage of practically all the bankrupt's assets more than four months before the said J. Herbert Weidhorn filed his voluntary petition in bankruptcy, and that the said Leo Weidhorn had fraudulently foreclosed said mortgage a few days before said petition.

The then respondent, Leo Weidhorn, before the hearing in the Referee's Court, filed an objection to the jurisdiction of the referee (Transcript, p. 17) and objected again at the hearing. (Transcript, p. 26).

The property in question has been, since the said foreclosure, stored in a public warehouse by, and in the name of the said Leo Weidhorn.

The Referee heard the evidence, found that the conveyances were fraudulent, declared them void, and ordered a conveyance to the Trustee in Bankruptcy of the said J. Herbert Weidhorn. (Transcript, p. 18).

Leo Weidhorn then petitioned to the District Court for a review of this decree, and the District Judge, after hearing, vacated the decree on the ground that the Referee exceeded his powers under the order of reference, which reference was made under General Orders XII (1), the District Court holding that the words "all proceedings" in that order do not include suits brought by a Trustee in Bankruptcy against third persons in respect to property not in the custody of the Bankruptcy Court. (Transcript, p. 27).

The Trustee in Bankruptcy then brought a Petition to Revise this decree under section 24b of the Bankruptcy Act in the Circuit Court of Appeals for the First Circuit, alleging that the District Court erred in the foregoing rulings. (Transcript, p. 1).

Leo Weidhorn, answering the Petition to Revise, pleaded

(1) That the application to the Circuit Court of Appeals should have been by appeal under section 24a of the Bankruptcy Act, and not under section 24b, and

(2) That the District Court did not err in finding that the Referee was without jurisdiction to make the decree which he recorded.

After hearing, the Honorable Circuit Court of Appeals, acting upon the aforesaid Petition to Revise, reversed the findings of the District Court on the ground that the Referee had jurisdiction of the original controversy and authority to make the decree which he made, and that the matter was properly brought before the Circuit Court of Appeals by the Petition to Revise. The case was remanded for further findings and proceedings on the merits. (Transcript, p. 39). An order and final decree were subsequently entered in accordance therewith. (Transcript, p. 45).

The petitioner submits that the learned Circuit Court of Appeals erred in the following particulars, and prays that this Honorable Court will examine and review the record in this case and revise the rulings of the learned Circuit Court of Appeals.

(1) The Court erred in ruling that the proceeding before it was properly brought as a Petition to Revise under section 24b of the Bankruptcy Act.

(2) The Court erred in ruling that under the terms of General Order XII (1) a reference by the District Judge to the Referee of an estate in Bankruptcy included the authority to hear and determine the issues raised by the so-called bill of complaint herein referred to, and to decree a conveyance of the property involved from the said Leo Weidhorn to the Trustee in Bankruptcy.

(3) The Court erred in ruling that the District Judge was without power, upon a Petition to Review, to find that the Referee, to whom he had referred the original bankruptcy case, exceeded the authority given him by the terms of reference, and erred also in ruling that the District Judge was not justified in vacating the decree of the Referee on that ground.

(4) The court erred in ruling that under a general reference the Referee had jurisdiction by section 38 (4), taken in connection with section 70 (e) of the Bankruptcy Act, to hear and determine the issues raised by the so-called bill of complaint herein referred to and decree a conveyance to the trustee in Bankruptcy of property in the possession of a person not a party to the bankruptcy proceedings.

(5) The court erred in ruling that there should be a decree reversing the decree of the District Court and awarding costs to the Trustee in Bankruptcy.

It is extremely important that the practice on this constantly recurring situation should be uniform and that it should be established whether or not the Referee in Bankruptcy has jurisdiction of actions in which the Trustee in

Bankruptcy attempts to obtain a conveyance to him, from a person in possession, not a party to the Bankruptcy proceedings, of property alleged to have been fraudulently conveyed to him by the bankrupt long before the Bankruptcy proceedings.

Wherefore your petitioner prays that the whole record may be examined, reviewed and revised by this Honorable Court and that such orders may be made as Justice may require.

And your petitioner respectfully prays that a writ of CERTIORARI be issued out of and under the seal of this Court, directed to the United States Circuit Court of Appeals for the first circuit, commanding said Court to verify and send to this Court on a day certain, to be therein designated, a full and complete transcript of the record of all proceedings of said Circuit Court of Appeals in this case (which was entitled in that Court Benjamin A. Levy, Trustee, Petitioner, in the matter of J. Herbert Weidhorn, Bankrupt, and numbered 1302 on the docket of said Court) to the end that said cause may be reviewed and determined by this Court as provided by law, and that your petitioner may have such other and further relief or remedy in the premises as to this Court may seem appropriate, and that said judgment of the said Circuit Court of Appeals may be reversed by this Honorable Court.

LEO WEIDHORN,

By his attorneys,

WALTER HARTSTONE,

WILLIAM M. BLATT.

State of Massachusetts

County of Suffolk, ss. Boston, August 15th, 1918

William M. Blatt, being duly sworn, deposes and says that he is counsel for Leo Weidhorn, petitioner, that he pre-

pared the foregoing petition, and that the allegations therein contained are true to the best of his knowledge and belief.

Subscribed and sworn to, before me,

BENJAMIN SILBER,

(Seal) Notary Public.

I hereby certify that I have examined the foregoing petition and in my opinion the petition is well founded and the case is one in which the prayer of the petition should be granted.

WALTER HARTSTONE,

Counsel for Petitioner.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1917.

LEO WEIDHORN, PETITIONER

v.

BENJAMIN A. LEVY, Trustee, RESPONDENT.

NOTICE.

The respondent is hereby notified that the petitioner will, on Monday, the seventh day of October, 1918, upon his verified petition and a copy of the entire record in this cause, at the opening of the court on that day or as soon thereafter as counsel can be heard, submit a petition for a writ of certiorari, a copy of which, and of the brief in support thereof are herewith delivered to you, to the Supreme Court of the United States in its court room at the Capitol in the City of Washington, D. C.

WALTER HARTSTONE,
WILLIAM M. BLATT.
Counsel for Petitioner.

The foregoing notice is hereby accepted and delivery of a copy of the petition for writ of certiorari and brief in support of the petition hereby acknowledged.

LEE M. FRIEDMAN,
SWIFT, FRIEDMAN & ATHERTON.
Counsel for Respondent.

UPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1917

No.

LEO WEIDHORN,
Petitioner

v.

BENJAMIN A. LEVY, Trustee,
Respondent

PETITION FOR WRIT OF CERTIORARI

Brief for Petitioner

WALTER HARTSTONE
WILLIAM M. BLATT
Counsel for Petitioner

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1917.

No.

LEO WEIDHORN, PETITIONER
v.
BENJAMIN A. LEVY, Trustee, RESPONDENT.

BRIEF FOR PETITIONER IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

The learned Circuit Court of Appeals, it is submitted, should not have entertained the Petition to Revise under section 24, sub-section b of the Bankruptcy Act, since that section does not apply to "controversies arising out of Bankruptcy proceedings," but only to "proceedings in Bankruptcy."

Coder v. *Arts,* 213 U.S. 223.

And a suit by a trustee against an adverse claimant having possession of the disputed property is clearly a "controversy," and not a "proceeding."

Hewit v. *Berlin Machine Works,* 194 U.S. 296.
Collier on Bankruptcy, 11th ed., p. 563, collecting cases.
In re Friend, 134 Fed., 778 (C.C.A.)
In re Loving, 224 U.S. 183.

And where the decree complained of is in relation to a plenary suit the exclusive remedy is by appeal under section 24a even though the only question before the Circuit Court of Appeals is a question of law.

Doroshaw v. *Ott,* 134 Fed., 740 (C.C.A., N.J.)
In re Rusch, 116 Fed. 270 (C.C.A., Wisc.)

II.

It is submitted that the learned Court of Appeals erred in ruling that the District Judge was not warranted in finding that the Referee exceeded his authority by the decree which he entered, ordering Leo Weidhorn to convey to the trustee the property which, it was alleged, had been fraudulently conveyed to him by the bankrupt more than four months before the bankruptcy proceedings.

HISTORICAL SUMMARY OF LEGISLATION.

a. Under the Bankruptcy Act of 1898 no jurisdiction was given to the courts of bankruptcy nor to the referee to compel adverse claimants to transfer to the trustee in bankruptcy property in the possession of such claimants before the bankruptcy proceedings were instituted.

Bardes v. *Hawarden Bank,* 178 U.S. 524.
Louisville Trust Co. v. *Comingor,* 178 U.S. 524.

b. In 1903 sections 60b, 67e, and 70e were amended (32 Stat. 797 c. 487), affecting the jurisdiction of bankruptcy courts in relation to suits under these sections. But it was held that the amendment still gave the courts of bankruptcy no jurisdiction to try actions brought under section 70e of the act without consent of the respondent.

Harris v. *Bank,* 216 U.S. 382.

c. A further amendment passed in 1910 (36 Stat. 840, c. 412) supplied section 23b with a clause whereby the missing power was presumably given to courts of bankruptcy to try actions brought by trustees under section 70e, that is, plenary actions to set aside fraudulent conveyances which could have been avoided by any creditor of the bankrupt in the State courts had not bankruptcy proceedings been instituted.

d. The original petition in this case was such an action (Transcript, p. 5), and was instituted in the office of the referee having charge of the case.

ARGUMENT.

1. The referee is not one of the "courts of bankruptcy" within the foregoing amendments.

The amendment to section 70e gives jurisdiction to "courts of bankruptcy as hereinbefore defined." The reference is obviously to section 1 (8) of the act which names only "the district courts of the United States and of the Territories, the Supreme Court of the District of Columbia, and the United States Court of the Indian Territory and of Alaska," thus excluding the referee's court; and although section 1 (7), in defining "court," says it *may* include the referee this must be taken as modified by section 1 (8), the meaning obviously being that for some purposes the referee is a court, but not by himself a court of bankruptcy.

Collier 1917 ed., p. 10
In re Walsh Bros., 163 Fed., 352 (D.C., Ia.)

Even if the referee be held to be a court of bankruptcy his special authority is defined by the act, which makes no mention of adverse claimants in c. V, secs. 38 and 39. If however the amendments of 1903 and 1910 conferred a latent jurisdiction it may be argued that by reference of the district judge under section 38a (4) he may acquire the active right to try cases like the one in question.

But section 38a (4) applies only to "duties," not "powers," under which latter word the right to entertain this controversy would come, whereas the word "duties" describes ministerial and obligatory acts of the nature of those enumerated in section 39.

2. Yielding, for the sake of discussion, and assuming that the proper order or rule of reference may give such authority, there was no such rule in this case.

The referee acted under General Orders XII (1), which provides that after a general reference "all proceedings, except such as are required by the act or these General

Orders to be before the Judge, shall be before the referee." If the referee had jurisdiction of the original suit, it must be because it was covered by the words, "all proceedings," in this order.

"Proceedings" has, in bankruptcy, a well-recognized, technical meaning. It has been defined under section 24, as—"covering questions between the alleged bankrupt and his creditors, as such, commencing with the petition for adjudication, ending with the discharge, and including matters of administration generally, such as appointment of receivers and trustees, sales, exemptions, allowances and the like, to be disposed of summarily, all of which naturally occur in the settlement of the estate;" Baker, J., *in re Friend*, 134 Fed. 778 (C. C. A. 7th Cir.). The word is frequently used in the General Orders; always in the same sense (*e.g.*, in the preamble, and in orders I., IV., V., VIII., XXI., XXXV.). When it is intended to refer to suits in equity or actions at law they are distinctly specified (G. O. XXXVII.).

3. Again granting, argumentatively, what is by no means really conceded, that G. O. XII (1) confers jurisdiction on the referee to try the case and make the decree which started this litigation, the district judge has the right under section 38a of the act to review acts of the referee. Surely this right of review includes the right to interpret the rule or order of reference and to find that the referee exceeded his instructions thereunder, which is what the district judge practically did.

A hearing before a referee is in the nature of a hearing in Equity and is governed by the rules of Equity procedure in the Federal Courts, both as to the hearing itself and as to review by the judge.

In re de Gottardi, 114 Fed. 228.

The judge has the right to limit the authority of the referee by rule or review and therefore by construction of the rule or order.

Equity Rule 72.

Though it is probably true, as the learned Circuit Court of Appeals declared, that the jurisdiction of the referee in this class of cases, under either of the amendments, has never been defined in a court of final jurisdiction it is nevertheless the opinion of the text book writers and such of the lower courts as have dealt positively with the subject that the referee has no such authority.

Remington on Bankruptcy, 2nd ed., secs. 545 and 1695, collecting cases.

Loveland on Bankruptcy, 10th ed., sec. 37.

In re Overholzer, 23 A. B. R. 10.

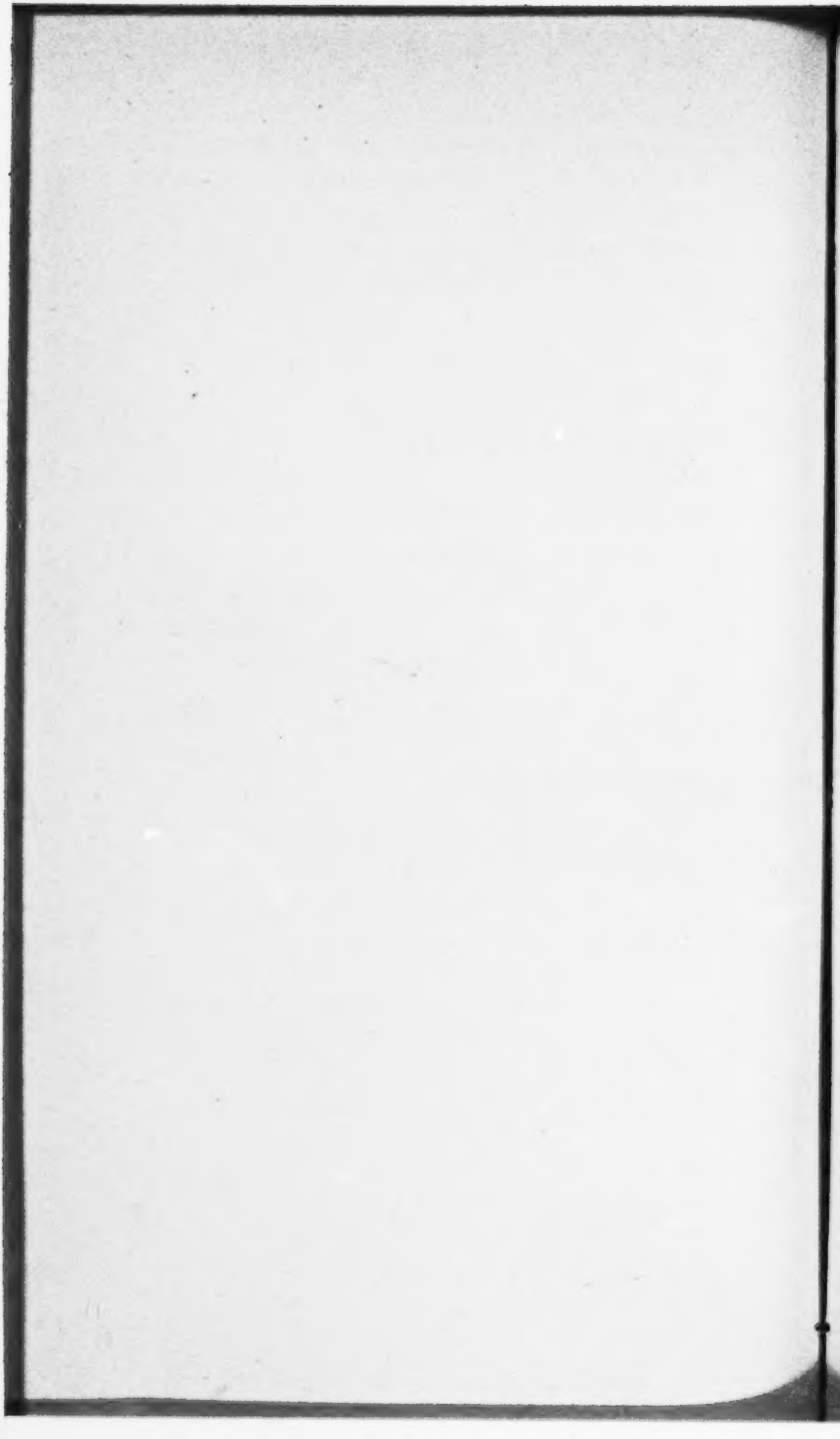
In re Carlile, 199 Fed. 612 (D.C., N.C.)

The referee's court is without adequate contempt powers to insure orderly trials (Bankr. Act, sec. 41), has no power to call for the assistance of a jury, and his whole establishment is obviously, and for obvious reasons, restricted to those functions which cannot as well be attended to in other courts, and it is submitted that the whole spirit of the bankruptcy act and of the decisions under it is incongruous with the idea of granting to him the right to entertain a plenary bill in equity, involving persons and property that have not before been brought within his jurisdiction.

WALTER HARTSTONE,

WILLIAM M. BLATT,

Counsel for Petitioner.



No. 655203

Supreme Court of the United States.

October Term, 1918.

LEO WEIDHORN,
PETITIONER,
v.
BENJAMIN A. LEVY,
TRUSTEE, RESPONDENT.

Brief for Respondent in Opposition to Petition for Writ of Certiorari.

While this case in certain aspects raises an important question of jurisdiction in bankruptcy practice, it does not possess those elements which justify taking the time of the Supreme Court for its further consideration.

POINT 1. NO CONFLICT OF DECISIONS.

The case is the only authoritative decision on the point at issue. There is, therefore, no contrariety of decisions between different Circuit Courts of Appeals on the subject.

POINT 2. THE DECISION OF LIMITED SCOPE.

The decision itself as it at present stands does not involve a large question of public importance or even of paramount significance in the practice under the

Bankruptcy Act. The scope of the decision is confined to an interpretation of an unlimited order of reference to a referee in bankruptcy under the General Orders in Bankruptcy XII and the provisions of the Bankruptcy Act relating to referees. The opinion of the Court points out that in any jurisdiction where the District Judge desires to limit the jurisdiction of his referees in cases referred to them he has that power of limiting their jurisdiction by an appropriate order of reference.

> "It will always be in the judge's power to prevent its adoption, as was not done here, by limiting the powers given the referee, in the order of reference."

Opinion of the Court (DODGE, J.) in Circuit Court of Appeals.

U.S. Revised Statute, §§ 566, 648.
Bankruptcy Act, § 22, *a* (1).

It is therefore respectfully submitted that no writ of certiorari ought to be granted in this case.

LEE M. FRIEDMAN,
SWIFT, FRIEDMAN & ATHERTON,
Counsel for Respondent.

REME COURT OF THE UNITED STATES

OCTOBER TERM, 1919

No. 203

LEO WEIDHORN,
Petitioner
v.
BENJAMIN A. LEVY, Trustee,
Respondent

ON WRIT OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF
APPEALS FOR THE FIRST CIRCUIT

Brief for Petitioner

WILLIAM M. BLATT
WALTER HARTSTONE
Counsel for Petitioner

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1919

No. 203

LEO WEIDHORN,
Petitioner

v.

BENJAMIN A. LEVY, Trustee,
Respondent

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

Brief for Petitioner

WILLIAM M. BLATT
WALTER HARTSTONE
Counsel for Petitioner

IN THE

SUPREME COURT OF THE UNITED STATES

No. 203 OCTOBER TERM, 1919.

LEO WEIDHORN, Petitioner
v.
BENJAMIN A. LEVY, Trustee, Respondent.

On Writ of Certiorari to the United States Circuit Court of Appeals for the First Circuit.

BRIEF FOR PETITIONER

STATEMENT OF THE CASE.

May It Please the Court:

The respondent, Benjamin A. Levy, in his capacity as trustee in Bankruptcy of the Estate of J. Herbert Weidhorn, filed a petition in the form of a Bill in Equity (Transcript, p. 4) against the petitioner, Leo Weidhorn, in the office of the Referee in Bankruptcy to whom the said Bankrupt's case had been referred. The petition alleged that the said Leo Weidhorn, a brother of the bankrupt, had, for the purpose of defrauding the creditors of the bankrupt, taken a chattel mortgage of practically all the bankrupt's assets more than four months before the said J. Herbert Weidhorn filed his voluntary petition in bankruptcy, and that the said Leo Weidhorn had fraudulently foreclosed said mortgage a few days before said petition.

The then respondent, Leo Weidhorn, before the hearing in the Referee's Court, filed an objection to the jurisdiction of the referee (Transcript, p. 12) and objected again at the hearing (Transcript, p. 18).

The property in question has been, since the said foreclosure, stored in a public warehouse by, and in the name of the said Leo Weidhorn.

The Referee heard the evidence, found that the conveyances were fraudulent, declared them void, and ordered a conveyance to the Trustee in Bankruptcy of the said J. Herbert Weidhorn (Transcript, p. 13).

Leo Weidhorn then petitioned to the District Court for a review of this decree, and the District Judge, after hearing, vacated the decree on the ground that the Referee exceeded his powers under the order of reference, which reference was made under General Orders XII (1), the District Court holding that the words "all proceedings" in that order do not include suits brought by a Trustee in Bankruptcy against third persons in respect to property not in the custody of the Bankruptcy Court (Transcript, p. 19). The Court also denied the jurisdiction of the referee on other grounds (Transcript, p. 20).

The Trustee in Bankruptcy then brought a Petition to Revise this decree under section 24b of the Bankruptcy Act in the Circuit Court of Appeals for the First Circuit, alleging that the District Court erred in the foregoing rulings (Transcript, p. 1).

Leo Weidhorn, answering the Petition to Revise, pleaded

(1) That the application to the Circuit Court of Appeals should have been by appeal under section 24a of the Bankruptcy Act, and not under section 24b, and

(2) That the District Court did not err in finding that the Referee was without jurisdiction to make the decree which he recorded.

After hearing, the Honorable Circuit Court of Appeals, acting upon the aforesaid Petition to Revise, reversed the findings of the District Court on the ground that the Referee had jurisdiction of the original controversy and authority to make

the decree which he made, and that the matter was properly brought before the Circuit Court of Appeals by the Petition to Revise. The case was remanded for further findings and proceedings on the merits (Transcript, p. 29). An order and final decree were subsequently entered in accordance therewith (Transcript, p. 29). On July 30th, 1918, a Motion for Stay of Mandate was filed by the respondent (Transcript, p. 29). On the same day the mandate was stayed (Transcript, p. 30) until further order of the Court. On October 31st, 1918, on the petition of Leo Weidhorn to the Supreme Court of the United States a writ of certiorari was granted (Transcript, p. 31), and return duly made (Transcript, p. 31).

ASSIGNMENTS OF ERROR.

The petitioner submits that the learned Circuit Court of Appeals erred in the following particulars, and prays that this Honorable Court will examine and review the record in this case and revise the rulings of the learned Circuit Court of Appeals.

(1) The Court erred in ruling that the proceeding before it was properly brought as a Petition to Revise under section 24b of the Bankruptcy Act.

(2) The Court erred in ruling that under the terms of General Order XII (1) a reference by the District Judge to the Referee of an estate in Bankruptcy included the authority to hear and determine the issues raised by the so-called bill of complaint herein referred to, and to decree a conveyance of the property involved from the said Leo Weidhorn to the Trustee in Bankruptcy.

(3) The Court erred in ruling that the District Judge was without power, upon a Petition to Review, to find that the Referee, to whom he had referred the original bankruptcy case, exceeded the authority given him by the terms of reference, and erred also in ruling that the District Judge was not

justified in vacating the decree of the Referee on that ground.

(4) The Court erred in ruling that under a general reference the Referee had jurisdiction by section 38 (4), taken in connection with section 70 (e) of the Bankruptcy Act, to hear and determine the issues raised by the so-called bill of complaint herein referred to and decree a conveyance to the trustee in Bankruptcy of property in the possession of a person not a party to the bankruptcy proceedings.

(5) The Court erred in ruling that there should be a decree reversing the decree of the District Court and awarding costs to the Trustee in Bankruptcy.

ARGUMENT

I. INAPPROPRIATENESS OF PETITION TO REVISE.

The learned Circuit Court of Appeals, it is submitted, should not have entertained the Petition to Revise under section 24, sub-section b of the Bankruptcy Act.

Section 24b does not apply to "controversies arising out of Bankruptcy proceedings," but only to "proceedings in Bankruptcy."

Coder v. *Arts*, 213 U.S. 223.

And a suit by a trustee against an adverse claimant having possession of the disputed property is clearly a "controversy," and not a "proceeding."

Hewitt v. *Berlin Machine Works*, 194 U.S. 296.
Collier on Bankruptcy 11th ed., p. 563, collecting cases.
In re Friend, 134 Fed. 778 (C.C.A.).
In re Loving, 224 U.S. 183.

And where the decree complained of is in relation to a plenary suit the exclusive remedy is by appeal under section 24a even though the only question before the Circuit Court of Appeals is a question of law.

Doroshaw v. *Ott*, 134 Fed. 740 (C.C.A. N.J.).
In re Rusch, 116 Fed. 270 (C.C.A. Wisc.).

II. REFEREE'S LACK OF JURISDICTION

It is submitted that the learned Court of Appeals erred in ruling that the District Judge was not warranted in finding that the Referee exceeded his authority by the decree which he entered, ordering Leo Weidhorn to convey to the trustee the property which, it was alleged, had been fraudulently conveyed to him by the bankrupt more than four months before the bankruptcy proceedings.

Historical Summary of Legislation.

a. Under the Bankruptcy Act of 1898 no jurisdiction was given to the courts of bankruptcy nor to the referee to compel adverse claimants to transfer to the trustee in bankruptcy property in the possession of such claimants before the bankruptcy proceedings were instituted.

Bardes v. *Hawarden Bank,* 178 U.S. 524.
Louisville Trust Co. v. *Comingor,* 178 U.S. 524.

b. In 1903 sections 23b, 60b, 67e, and 70e were amended (32 Stat. 797, c. 487), affecting the jurisdiction of bankruptcy courts in relation to suits under these sections. But it was held that the amendment still gave the courts of bankruptcy no jurisdiction to try actions brought under section 70e of the act without consent of the respondent.

Harris v. *Bank,* 216 U.S. 382.

c. A further amendment passed in 1910 (36 Stat. 840, c. 412) supplied section 23b with a clause whereby the missing power was presumably given to courts of bankruptcy to try actions brought by trustees under section 70e, that is, plenary actions to set aside fraudulent conveyances which could have been avoided by any creditor of the bankrupt in the State courts had not bankruptcy proceedings been instituted.

d. The original petition in this case was such an action (Transcript, p. 4), and was instituted in the office of the referee having charge of the case.

Contentions.

1. The referee has no jurisdiction of controversies under section 70e of the Bankruptcy Act as amended.

The amendment to section 70e gives jurisdiction to any "court of bankruptcy as hereinbefore defined." The reference is obviously to section 1 (8) of the act which names only "the district courts of the United States and of the Territories, the Supreme Court of the District of Columbia, and the United States Court of the Indian Territory and of Alaska," thus excluding the referee's court as a court of original jurisdiction for such actions; and although section 1 (7), in defining "court," says it may include the referee this must be taken as modified by section 1 (8), the meaning obviously being that for some purposes the referee is a court, but not, by himself and considered separately, a court of bankruptcy.

Collier on Bankruptcy, 1917 ed., p. 10.
In re Walsh Bros., 163 Fed. 352 (D.C. Ia.).

In section 70e itself is contained a use of the word "Court" which obviously does not include the courts of bankruptcy ("Any State court" in the last sentence).

That the words "court of bankruptcy" do not always include the referee is shown in section 1 (16) of the act which provides that a "judge" of a "court of bankruptcy" does not include the referee.

See an interesting discussion in *In re Cobb*, 112 Fed. 655.

And in section 38 (4) another section vitally involved in this suit the words "courts of bankruptcy" are used in such a way as to assume that the referee is not a court of bankruptcy himself but is only "included" in the term when the context would otherwise create an anomaly.

This view does no violence to the amendment to section 70e. It recognizes that all courts of bankruptcy have jurisdiction. The District Court is named as one of the Courts of Bank-

ruptcy in section 1 (8) but the referee, though appointed by the District Court is only an officer with certain definite functions and powers and there is nothing in the amendment of 1910 to indicate that Congress intended to enlarge the powers of a special officer of a court but of the Court itself.

The referee's court is not a "court of bankruptcy" in itself, but only a branch of a court of bankruptcy, the District Court, and is without jurisdiction to act until a case is referred to him by the District Judge, and then only within the powers specifically given to him by the act. These powers are enumerated in section 38 and 39 of the Act and do not include the exercise of original jurisdiction over plenary suits in independent controversies not arising out of the regular administration of cases referred to him. It must therefore be inferred that even if the referee's court is a branch of a court of bankruptcy it is not intended by the 1903 and 1910 amendments to confer original jurisdiction on it in view of the intrinsic nature and purpose of the office.

And as a further indication of the intention of the statute is it not apparent that the amendments of 1903 and 1910 were not designed to authorize something which is manifestly impossible, to wit, the trial of a plenary *suit* in a court which has no machinery for such a proceeding?

Under the decision in *Harris* v. *Bank* (*supra*) and all other cases before the 1910 amendment it was clear that an adverse claimant could not be compelled by a trustee to give up property in the claimant's possession which had been fraudulently transferred by the bankrupt to him except by a plenary suit instituted in a state court or, with the consent of the defendant, in a court of bankruptcy. The 1910 amendment to section 23b did not change the law except to allow *suits* under section 70e to be brought without consent elsewhere than in the courts where the bankrupt might have prosecuted them if proceedings in bankruptcy had not been instituted. But the referee has neither the machinery nor the authority of the act in any of its other parts to entertain such a plenary suit.

The referee's court is without adequate contempt powers to insure orderly trials (Bankr. Act, sec. 41), has no power to call for the assistance of a jury, cannot exclude or otherwise control evidence as a true plenary suit requires, and his whole establishment is obviously, and for obvious reasons, restricted to those functions which cannot as well be attended to in other courts, or by the District Court proper, and it is submitted that the whole spirit of the bankruptcy act and of the decisions under it is incongruous with the idea of granting to him the right to entertain a plenary bill in equity, involving persons and property that have not before been brought within his jurisdiction.

Though it is probably true, as the learned Circuit Court of Appeals declared, that the jurisdiction of the referee in this class of cases, under either of the amendments, has never been defined in a court of final jurisdiction it is nevertheless the opinion of the text-book writers and such of the lower courts as have dealt positively with the subject that the referee has no such authority.

Remington on Bankruptcy (2d ed.), secs. 545 and 1695, collecting cases.

Loveland on Bankruptcy (10th ed.), sec. 37.

In re Overholzer, 23 A.B.R. 10.
In re Carlile, 199 Fed. 612 (D.C. N.C.).

Where the assumption of jurisdiction by the referee in these controversies has not been disturbed by the upper courts, the parties will be found to have consented thereto, or at least not to have protested before the decree.

2. Yielding, for the sake of discussion, and assuming that the proper order or rule of reference may give the referee authority to try controversies of this description, there was no such order or rule in this case.

As the District Judge says (Transcript, p. 19):

> "The duties of the referee do not begin until the case has been referred to him; and his jurisdiction, therefore, includes only such parts of the Bankruptcy jurisdiction of the District Court as are carried by the reference."

The reference was made under General Orders XII(1), which provides that, after a general reference, "all proceedings, except such as are required by the act or these General Orders to be before the Judge, shall be before the referee." If the referee had jurisdiction of the original suit, it must be because it was covered by the words, "all proceedings," in this order.

"Proceedings" has, in bankruptcy, a well-recognized, technical meaning. It has been defined under section 24, as—

> "covering questions between the alleged bankrupt and his creditors, as such, commencing with the petition for adjudication, ending with the discharge, and including matters of administration generally, such as appointment of receivers and trustees, sales, exemptions, allowances and the like, to be disposed of summarily, all of which naturally occur in the settlement of the estate;" BAKER, J., *In re Friend*, 134 Fed. 778 (C.C.A. 7th Cir.).

The word is frequently used in the General Orders; always in the same sense (*e.g.*, in the preamble, and in orders I., IV., V., VIII., XXI., XXXV.). When it is intended to refer to suits in equity or actions at law they are distinctly specified (G.O. XXXVII.).

Coder v. *Arts*, 213 U.S. 223.
Hewitt v. *Berlin Machine Works*, 194 U.S. 296.
In re Loring, 224 U.S. 183.

That the Order contemplates only "proceedings" in this technical sense is seen in the clause, "except such as are required by the act or these General Orders to be before the judge," it being obviously assumed that "controversies" (which by section 70e may be brought in the State courts), are

not "proceedings," and therefore need not be mentioned as exceptions (at the election of the trustee plaintiff) as, in the view of the present respondent, they are.

3. Again granting, argumentatively, what is by no means really conceded, that a proper order of reference might confer jurisdiction on the referee to try the case and make the decree which started this litigation, the district judge has the right under section 2(10) of the act to review acts of the referee. Surely this right of review includes the right to interpret the rule or order of reference and to find that the referee exceeded his instructions thereunder, which is what the district judge practically did.

A hearing before a referee is in the nature of a hearing in Equity and is governed by the rules of Equity procedure in the Federal Courts, both as to the hearing itself and as to review by the judge.

In re de Gottardi, 114 Fed. 228.

The judge has the right to limit the authority of the referee by rule or review and therefore by construction of the rule or order on review.

Equity Rule 72.

The Court of Appeals of the First Circuit should be reversed.

Respectfully submitted,

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